HO YOKE KWEI & ANOR

v.

ONG ENG HIN

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: 11-21 OF 1994]
6 OCTOBER 1997

CIVIL PROCEDURE: *Costs - Interlocutory proceedings - Bill of costs - Taxation - Whether should be at the end of action - "Appeal dismissed with costs", meaning of - Discretion of court to award costs - Rules of the High Court 1980, O. 59 rr. 3 & 4*

While the main action was pending, a notice of taxation of the bill of costs in relation to an interlocutory proceeding that was concluded was filed by the plaintiff before the Senior Assistant Registrar ('SAR'). The defendant raised a preliminary objection to the effect that as the matter was in relation to an interlocutory proceeding, the issue of costs should be settled only at the end of the main action.

This preliminary objection was overruled by the SAR and the defendant appealed against that decision. The issue before the present court was whether the taxation of the bill of costs ought to be resolved at the end of the main action or might be taxed even before the conclusion of the substantive action.

Held:

[1] The general principle envisaged in the Rules of the High Court 1980 is that costs follow the event and that the successful party is entitled to be paid his costs except when it appears to the court that in the circumstances of the case some other order should be made. The question of costs to be awarded in any particular case depends on the judicial discretion of the court.

[2] It is trite that absolute success is not the criterion to be adhered to to entitle a party to costs, as a party may be entitled to interlocutory costs along the way or when a party merely succeeds substantially in proving his allegations.

[3] Where the orders read: (i)"costs in the cause", then the award conferred will be according to the final award of costs in the action; (ii) plaintiff's/defendant's/appellant's/respondent's costs", then the costs may be taxed without waiting for the finalisation of the case; and (iii) "plaintiff's/

defendant's costs in any event", then regardless of the eventual winner in the main suit, the successful party during the interlocutory proceeding will still be entitled to the costs, but must patiently wait for it to be taxed at the end of the main suit.

[4] The minutes of the learned Judicial Commissioner at the end of the interlocutory proceeding was "appeal dismissed with costs". Since no specifications were indicated in that particular order regarding the time of payment, the plaintiff was entitled to have his costs taxed without waiting for the finalisation of the case. Had the learned Judicial Commissioner clarified the matter with the word "in any event" or "costs in the cause", then the plaintiffs would have had to wait until the end of the action to have the bill of costs taxed.

[Defendant's appeal dismissed with costs.]

Cases referred to:

Adam & Harvey, Ltd v. International Maritime Supplies Co Ltd [1967] 1 All ER 533 ***(refd)***

Allied Collection Agencies Ltd v. Wood & Anor [1981] 3 All ER 176 ***(refd)***

Chow Yong Hong v. Chow See Lim & Anor [1959] 25 MLJ 23 ***(refd)***

Ghanasham v. Moroba ILR 5 Cal 475 ***(cit)***

JT Stratford & Son, Ltd v. Lindley And Ors (No 2) [1969] 3 All ER 1122 ***(refd)***

Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (PG) Bhd [1990] 1 MLJ 304 ***(refd)***

Lim Ker v. Chew Seok Tee [1967] 2 MLJ 253 ***(cit)***

Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh [1992] 1 MLJ 147 ***(refd)***

Ottway v. Jones [1955] 2 All ER 585 ***(cit)***

Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew [1987] 1 MLJ 25 ***(cit)***

Legislation referred to:

Rules of the High Court 1980, O. 59 rr. 3, 4(i)

Other sources referred to:

Costs In Civil Litigation And Non-Litigious Work, Butterworths, 2nd edn, p 61

Halsbury's Laws Of England, 4th edn, p 547, para 712

Mallal's Supreme Court Practice, vol 1, pp 1047-1049

The Supreme Court Practice, 1996, vol 1, p 963

For the applicant - LK Teoh; M/s Koh Kim Leng & Co

For the respondent - AC Vohrah; M/s Vohrah & Tan Chee Lan

JUDGMENT

Suriyadi Halim Omar J:

On 10 June 1992 Guaman Sibil No. 52-254-1992 was filed at the Subordinate Courts with pleadings deemed to be closed by 8 September 1992 after all the necessary actions had been undertaken by parties concerned. On 29 April 1993 an order to amend the summons and statement of claim were obtained, followed by the amended statement of defence and counterclaim by 2 September 1993. On 5 September 1994 an application was made by the plaintiff to strike out the statement of defence and counterclaim but only successful in so far as getting the counterclaim struck off. Pursuant to this decision the defendants filed a notice of appeal on 20 December 1994. The appeal was eventually heard by the High Court at Melaka wherein the appeal was dismissed with costs on 23 August 1996.

No further appeals ensued pursuant to this matter and on 27 March 1997 a notice of the taxation of the bill of costs were filed before the Senior Assistant Registrar. The defendants raised a preliminary objection, to the effect that as the matter was in relation to an interlocutory proceeding, then the issue of costs should be settled at the end of the action. This preliminary objection was overruled, and being dissatisfied with that decision, the defendants appealed against that decision. I heard the appeal and dismissed it with costs.

In brief the relevant matter before me was whether the taxation of the bill of costs ought to be resolved at the end of the action or may be taxed even before the conclusion of the substantive case. Under O. 59 r. 3 of the Rules of the High Court 1980 no party shall be entitled to recover any cost of or incidental to any proceedings from any other party to the proceedings except under an order of the court. If the court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, order the costs to follow the event, except when it appears that in the circumstances of the case, some other order should be made as to the whole or any part of the costs. Therefore the general principle envisaged in the Rules of the High Court 1980 is simply that costs follow the event and that the successful party is entitled to be paid his costs except when it appears to the court that in the circumstances of the case some other order should be made (see *Petroliam Nasional Bhd. (Petronas) & Anor. v. Cheah Kam Chiew* [1987] 1 MLJ 25; *Ottway v. Jones* [1955] 2 All ER 585). Apart from the above principle it is also trite that the question of costs to be awarded in any particular case depends on the judicial discretion of the court. Hashim Yeop Sani CJ Malaya when delivering the judgment of the court in *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh* [1992] 1 MLJ 147 at p. 150 opined:

> The question of costs to be awarded in any particular case depends on the discretion of the judge. The discretion is a judicial discretion and must be exercised according to settled principles. There must be sufficient materials for the judge to exercise his discretion so that the discretion will not appear to be exercised arbitrarily or capriciously.

(see also *Lim Ker v. Chew Seok Tee* [1967] 2 MLJ 253 where Ong Hock Thye FJ viewed that where a successfully party enforces a legal right and in no way misconducts himself was entitled to costs as of right.)

In general "costs" means the charges which a solicitor is entitled to make and recover from the client employing him as his remuneration for professional services such as legal advice, attendances, drafting, conducting legal proceedings, etc. This term also covers the expenses which a person is entitled to recover from the other side by reason of his being a party to the legal proceeding, and this may include the court fees, stamps, etc. and where represented, the charges and fees of the solicitor and counsel. The amount of these costs is ascertained by the process of taxation which is regulated by certain principles of general application. The costs allowed to a successful litigant are termed "costs as between party and party" which will not include all the expenses to which the party had been put. The costs of the general or ordinary proceedings in an action or suits are called "costs in the cause" or "costs in the action" (see pp. 1047-1048 of *Mallal's Supreme Court Pratice* Vol.1).

Apart from those types of costs, costs may also be ordered for interlocutory applications. As *Mallal* wrote at p. 1048:

> The costs of an interlocutory application are sometimes ordered to be the costs of one of the parties in any event; so that even if he loses the action he is entitled to set off the amount of the costs against the costs in the cause which he has to pay. Sometimes interlocutory costs are ordered to be the "plaintiff's (or defendant's) costs in the cause": that party will get those costs if he wins and will not be called on to pay those costs to the other side if he loses the action.

From the comments at 1048 of *Mallal* it is clear that courts will provide for costs at the interlocutory stage to the successful party even if at the end of the action that successful party may not be the eventual winner. This order is generally made when the application was rendered necessary by the action or default of the other party. To summarise, it is trite that absolute success is not the criteria to be adhered to to entitle a party to costs, as a party may be entitled to interlocutory costs along the way or when a party merely succeeds substantially in proving his allegations (see *Mallal's Supreme Court Practice* vol. 1 p. 1049 and *Ghanasham v. Moroba* ILR 5 Cal. 475; *Mallal's Supreme Court Practice* 2nd edn, by Tan Sri Datuk Chan Min Tat).

With regard to interlocutory costs the relevant question begged to be discussed is when should that costs be taxed. The plaintiff in this case not unexpectedly, ventilated that the taxation can take place even before the completion of the substantive action whilst the defendants canvassed that all acts of taxation must be at the end of the action if the court when ordering costs did not specify when the taxation ought to take place. Two cases namely *Chow Yong Hong v. Chow See Lim & Anor*. [1959] 25 MLJ 23; *Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (PG) Bhd* [1990] 1 MLJ 304 were adverted to by the defendants for purposes of propping up their case. In the former case of Chow Yong Hong, the plaintiff requested for an order that the payment of the taxed costs awarded under the Rules of the Supreme Court to the defendants upon being given unconditional leave to defend, be postponed until the suit was finally decided. This application was made as the defendants after having had his costs taxed attempted to levy execution in respect of those costs. Smith J in that case opined at p. 24 para E-H:

> It appears to me, therefore, that the proceedings are purely interlocutory and should *prima facie* follow the general rule of interlocutory proceedings and that costs should be settled at the end of the action.
>
> It therefore becomes necessary to consider the exact terms of the order as drawn up in order to discover whether or not it implies that the costs are to be paid forthwith. Reading O. 14 r. 9 as a whole it is clear that the Judge under paragraph (a) has power to say when the costs shall be paid, and under paragraph (b) he is given the express power to order payment forthwith. In this particular case it is not expressly ordered that costs be paid forthwith. It could therefore be implied that, since it is not ordered that costs be paid forthwith, the usual practice should prevail and that the costs should become payable when the suit has been finally decided.

Mohamed Dzaiddin J (as he then was) in *Ko Ko Ma Pony Horse Centre*, by virtue of the unusual set of facts had opted to adopt the decision of Smith J in *Chow Yong Hong*.

In spite of the vehemence of the defendants, regarding the strength of these two cases, apart from them being local, I am inclined to assert that these two cases of *Chow Yong Hong v. Chow See Lim & Anor*. and *Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (PG) Bhd*. are inapplicable for the problem at hand. To begin with *Chow Yong Hong*, it may be observed that a pertinent distinction existed between them, in that for the current case the issue involved a pre-taxation of the bill of costs problem whilst in *Chow Yong Hong* that issue was academic as taxation had already taken place. The matter of contention there related to the unsuccessfull attempt to enforce the

bill of costs that had already been taxed. The case of *Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (PG) Bhd*. in a certain way is quite similar to the current case but distinguishable by the differences in the intention of the relevant judge when the interlocutory costs were conferred. At p. 305 Mohamed Dzaiddin J (as he then was) said:

> Finally, which I should add in retrospect, I never intended to order that the costs be taxed and paid forthwith at the time when I gave my decision dismissing the defendant's application with costs.

Perhaps due to His Lordship's actual intention not being reflected in the eventual order, resulted in these comments being uttered, viz.:

> Therefore, in the **circumstances of the whole case,** I come to the following conclusion. First, I adopt the decision of Smith J in Chow Yong Hong who held that where the proceedings were purely interlocutory, costs should follow the general rule that it should be settled at the end of the action.

The unusual set of facts, particularly the differences in the intention of the judge *vis-a-vis* the order extracted would be more akin to the case of *Adam & Harvey, Ltd. v. International Maritime Supplies Co., Ltd. (infra)* where the extracted order also did not tally with the intended order, but with a different outcome. There the court opined that costs from interlocutory proceedings need not necessarily be taxed only at the end of the main action. More of this later.

In the current case there is no evidence before me to show that the learned Judicial Commissioner's intention differed with the extracted order. *Prima facie* I must accept the order of the court at face value. On these fundamental differences the case of *Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (PG) Bhd.* therefore is inapplicable for the matter at hand.

Before jumping to any premature legal conclusions permit me first to scrutinise what the English law has to say on the matter being discussed. *Halsbury's Laws Of England* 4th edn, p. 547 para. 712 reads:

> ... In relation to interlocutory proceedings, "costs in the cause" means that the costs of those proceedings are to be awarded according to the final award of costs in the action; **"plaintiff's costs" (or "defendant's costs") means that the plaintiff (or defendant) is to have the costs of the interlocutory proceedings without waiting for a final decision in the action;** ... "plaintiff's (or defendant's) costs in any event" means that, no matter who wins or loses when the case is finally decided or settled, the plaintiff (or defendant) is to have the costs of those interlocutory proceedings, although it does not confer upon him a right to tax the costs until the event is finally decided or settled.

Harman LJ in *Adam & Harvey, Ltd. v. International Maritime Supplies Co., Ltd.* [1967] 1 All ER 533 distinguished and confirmed the differentiation of the words "appeal allowed with costs in any event" and "appeal allowed with costs".

During the trial His Lordship Harman LJ said:

> I have been under the impression that the court, when it intended that result, would say expressly "Costs to be taxed and paid forthwith"; but the Supreme Court Practice, 1967 (1) shows that I was wrong about that. It is a thing often asked for and I have made the order in that form, notwithstanding that the application was interlocutory, **that payment should be made at once if the successful party chose to tax the costs.** However that may be, I think it is fair to counsel for the defendants to say that in spite of the fact that he assented to interlocutory observation, there was this difference ... that he applied in the form of words which would carry, if it was assented to, an immediate taxation ... it did not strike counsel for the plaintiffs, who was unaware of **the difference that there is between appeal allowed with costs in any event and appeal allowed with costs,** which is something as a nicety. As counsel for the defendants endorsed his brief and as the learned associate understood, it was an order which entailed the right to an immediate taxation and payment ... (emphasis supplied).

Some clarification is required for those remarks. They were made as a consequence of an application to the Court of Appeal to rectify an order that read "allowed with costs" by adding the words "in any event". The Court of Appeal allowed that application as the original order drawn did not express the true intention of the court despite Harman LJ having uttered the words "no immediate taxation". His Lordship clarified that "as far as I am concerned, I did not intend that there should be this exceptional order for payment of costs at once, but that costs should be in any event those of the successful appellant."

This case was also deservedly mentioned in *The Supreme Court Practice* Malaysian edn, 1996 reprint of 1979 edn, Vol. 1 p. 963. Endorsing the above view *Butterworths, Costs In Civil Litigation And Non-Litigious Work,* 2nd edn, wrote at p. 61

> An order for "Cost in any event - Plaintiff's (or defendants)" is usually made in interlocutory proceedings, and means that such costs (whatever the final result of the cause or matter) are payable to the named party by the other when the general costs are taxed .... during the cost of the action several orders had been made in which the plaintiff is ordered to pay the costs of the defendants in some cases in any event "the right to the costs in any event is not affected and the defendants are entitled to taxation and payment of their costs of interlocutory proceedings" (*Walter v. Bewicke, Moreing & Co.* [1904] 90 LT 409 CA)

At p. 62 on the issue of "costs to be paid", is written:

> An order, directing costs to be paid, and where not "costs in any event", entitles the successful party to have the costs taxed without waiting for the general taxation.

in *JT Stratford & Son, Ltd. v. Lindley And Others (No. 2)* [1969] 3 All ER 1122 at p. 1123 Lord Denning, MR said:

> "Plaintiff's costs in any event" means that, no matter who wins or loses when the case is decided, the plaintiff is to have the costs of those interlocutory proceedings. "Plaintiff's costs" means that the plaintiff is to have the costs of the interlocutory proceedings without waiting for a decision."

In *Allied Collection Agencies Ltd v. Wood And Another* [1981] 3 All ER 176 the Queen's Bench Division affirmed the above views when Neil J at p. 181 said:

> I can therefore state my conclusion as follows. (1) Where on an interlocutory application the court intends that one party is to have the costs, the usual form of order is 'costs in any event'. It is only in exceptional circumstances that the words 'defendant's costs' or the words 'plaintiff's costs' are used. (2) If the words 'plaintiff's costs' or 'defendant's costs' are used they are effective to entitle the party concerned to obtain an immediate taxation.

Before proceeding permit me to reproduce in toto O. 59 r. 4(i) which reads:

> (1) Costs may be dealt with by the court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the court for the payment of any costs may, if the court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

After a careful scrutiny of this provision, and having considered the relevant Malaysian cases and the views of English judges these simplified but considered interpretations may be arrived at as regard costs in general, viz

1. with the two clauses being separated by the semicolon it must mean that there are at least two different principles or stages between them;

2. the first part of the provision is wide enough to cover the general term of dealing with costs eg, the choice of time when the court may wish to resolve the issue of cost, if no order has been made, or to permit taxing the bill of costs if the order already made pursuant to interlocutory proceedings did not inhibit the immediate taxation (which also happened in *Chong Hong Yong* though not its execution);

3. the issue of costs may be dealt with by the court at any stage of the proceedings;

4. similarly the second part of the provision is wide enough to cover the enforcement of the payment after taxation had taken place (In *Chow Hong Yong* Smith J allowed the stay of execution and refused immediate payments even though taxation had already occurred. His Lordship did agree that costs could be paid forthwith if an expressed order had been pronounced);

5. the court has a discretion to order payment of costs forthwith if it thinks fit; and

6. the court has a discretion to order payment of costs if it thinks fit even if the case has not been concluded.

By virtue of the above simplified interpretations of O. 59 r. 4(i) RHC 1980 arrived at after interpreting that provision liberally, supported by the authorities as regard costs pursuant to interlocutory proceedings, I am inclined to follow the pursuasive views of the English authorities and hold that where the orders read:

(i) "costs in the cause" then the award conferred will be according to the final award of costs in the action;

(ii) "plaintiff's/defendant's/appellant's/respondent's costs" then the costs may be taxed without waiting for the finalisation of the case; and

(iii) "plaintiff's/defendant's costs in any event" means regardless of the eventual winner in the main suit, the successful party during the interlocutary proceeding will still be entitled to the costs, but must patiently wait for it to be taxed at the end of the main suit.

Perusing the learned Judicial Commissioner's order as per encl. 27, which dealt with an interlocutary matter, with regard to the costs, I only observed the minutes in these terms ".... rayuan telah ditolak dengan kos" ("appeal dismissed with cost"). Since no specifications were indicated in that particular order regarding the time of payment, then by virtue of the above analysis of the law, the plaintiff was entitled to have his costs taxed without waiting for the finalisation of the case. Taking a cue from the case of *Chow Hong Yong* where taxation had already taken place, but not viewed negatively by Smith J, though rejecting immediate payments, what with the scope of O. 59 r. 4(i) RHC 1980 being wide, and compounded by the briefness of the order merely reading "rayuan ditolak dengan kos" (appeal dismissed with costs) which allows immediate taxation, I had no hesitation in making a finding that in this

case the rejection of the preliminary objection by the learned Senior Assistant Registrar was in order. Had the learned Judicial Commissioner clarified the matter with the words "in any event" or even stated it in the general term of "costs in the cause" then the plaintiffs would have had to wait until the end of the action to have the bill of costs taxed.

Reported by Ling Hea Hoon